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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO MEDINA, Defendant and Appellant.	B290264 (Los Angeles County Super. Ct. No. BA441899)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed and remanded with directions.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Antonio Medina (defendant) appeals from his murder conviction, asserting as follows: the trial court incorrectly instructed the jury regarding malice and voluntary manslaughter; the trial court erred in failing to properly instruct the jury regarding premeditation and deliberation; the trial court gave an inadequate response to jury questions; the trial court asked improper questions of the defense expert; the trial court erroneously excluded evidence of methamphetamine in the victim's blood; defendant's admissions of prior conviction allegations were not made knowingly and voluntarily; the cumulative effect of all the asserted errors was to deny defendant a fair trial; and the matter should be remanded to allow the trial court to exercise its discretion whether to strike the five-year enhancement imposed under Penal Code section 667, subdivision (a).[1]

We remand to give the trial court the opportunity to exercise its discretion under section 667, subdivision (a) and section 1385. Finding no merit to defendant's remaining contentions, we affirm the judgment.

BACKGROUND

Defendant was charged with the murder of Kassandra O., in violation of section 187, subdivision (a). The information alleged that defendant used a sledgehammer, a deadly weapon within the meaning of section 12022, subdivision (b)(1). It was also alleged that defendant had a prior serious or violent felony conviction within the meaning of sections 667, subdivisions (b) through (i), and 1170.12 (the "Three Strikes" law). The same felony conviction was also alleged pursuant to section 667,

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

subdivision (a)(1). It was further alleged that defendant had suffered three prior convictions resulting in prison custody within the meaning of section 667.5, subdivision (b).

A jury found defendant guilty of first degree murder, and found true that defendant used a sledgehammer. Defendant admitted the prior convictions, and on May 16, 2018, the trial court sentenced him to a total prison term of 59 years to life. The sentence was comprised of 25 years to life for murder, doubled as a second strike, plus consecutive enhancements of five years pursuant to section 667, subdivision (a), an additional one year due to the use of a deadly weapon, pursuant to section 12022, subdivision (b)(1), and a consecutive one-year enhancement for each of the three prior convictions resulting in prison terms. Defendant was given 889 actual days of presentence custody credit, plus conduct credits of 133 days. Defendant was ordered to pay mandatory fines and fees, as well as a payment of $5,000 to the Victim Compensation Board.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Beverly Lo and Jose Velasco (Lo and Velasco) lived in a duplex on Sydney Drive with their children and other relatives. They rented a room with a bathroom built into the garage to Jose Sarabia and Emily Smith (Sarabia and Smith). The main entry to the converted garage was through a pedestrian door that opened into a workspace and storage area where Velasco kept his tools.

Lo and Velasco had known defendant for several years before November 20, 2015 (November 20), and were aware that defendant and Kassandra had been a relationship for about two

years. Velasco had permitted defendant to occasionally stay overnight in the garage, though Lo testified that she did not like him there. During the week prior to November 20, Lo had heard defendant arguing with Kassandra in the driveway as they walked back toward the garage. More than once, Lo heard him say such things to Kassandra as "Get the fuck away from me. Get the fuck out of here."

Sarabia, also acquainted with defendant and Kassandra, often saw them at the house both together and separately. A day or two before November 20, while in his room, Sarabia heard defendant and Kassandra arguing about defendant wanting to cut Kassandra's hair, which Kassandra did not want. Kassandra sounded angry and defendant said things to her, such as, "Get the fuck over here." Sarabia routinely left for work at 3:30 or 4:00 a.m., and occasionally saw defendant sleeping in the garage when he left, and once Sarabia also saw Kassandra sleeping in the garage with defendant. On the morning of November 20, defendant was sleeping there alone when Sarabia left for work. Sarabia had last seen defendant sleeping in the garage two or three days earlier.

When Sarabia returned home from work at about 1:00 p.m., Kassandra was in his room talking to Smith. He told Kassandra to leave as Lo did not want her there. Kassandra left immediately. Sarabia saw defendant around 5:30 p.m., when defendant helped Sarabia carry laundry. Sarabia did not notice anything unusual about their conversation.

Lo, Velasco and their children went bowling that evening at about 9:00 p.m. Rosendo Garcia (Garcia), a car mechanic and friend of Lo and Velasco, was permitted to work on cars in their driveway. Garcia was there, working on a car from about 7:00

p.m. Around 11:00 p.m., defendant and Kassandra arrived. Kassandra was crying, her eyes watery, and her face red. Defendant appeared to be high, and talked like a robot, but did not seem "spaced out."

Lo had told Garcia that no one was allowed to be at their property when they were not home, so Garcia told defendant and Kassandra to leave when they arrived. Defendant replied that they would go after they used the restroom. Defendant and Kassandra then went into the garage, and when they did not come out, Garcia went in and again told them to leave.

Sarabia testified that as he was going to sleep he heard defendant and Kassandra arguing, but could not tell what was said other than hearing defendant say, "If you want to fuck with me," to which Kassandra replied "No, no, no." Her tone of voice suggested a denial, as though she was saying that something was not true, and she was crying.

A few minutes before midnight, defendant went out and made small talk with Garcia. He suggested that Garcia personally tell Kassandra to leave. Defendant appeared to Garcia to be "spaced out" as though he were sleep walking and giving partial, zombie-like responses to questions. Garcia went into the lit garage and noticed that the only extension cord that was plugged in was the cord that powered a work light. Defendant and Kassandra remained in the garage, and Garcia went back to work. Music was playing on a radio and Garcia was using a battery powered impact drill. Between the music and the drill, Garcia heard no other sounds in the area. At some point Garcia's work light went out for maybe a minute. Sometime around midnight Garcia spoke by telephone to Velasco at the bowling alley, and said defendant and Kassandra were there,

would not leave, and were loudly arguing. Velasco told Garcia that he would return home.

Around 12:30 a.m., defendant came out of the garage alone. Garcia noticed that he was buttoning his shirt, was sweaty, and appeared to be a somewhat jumpy.

Lo and Velasco returned from the bowling alley about 12:40 a.m. They put the children to bed and then returned outside, where Lo saw movement behind a tarp which hung over the garage door. With Garcia and Velasco behind her, Lo tried to open the garage door, but it was locked, which was unusual. The inside light was not on.

Sarabia was awakened by Lo's pounding on the door and her loud voice angrily telling defendant to open the door. Sarabia then opened his door slightly and noticed that the light was off outside his room, which was unusual. He could not see anything in the dark, so he yelled out to defendant to open the door, and then went back to bed.

Lo continued to pound on the door, asking who was inside. Defendant replied, "It's just me, Tony." Upset because defendant was not supposed to be there, Lo asked him to open the door. Defendant replied that he was changing and then leaving. Even more upset, Lo yelled to him to open the door. After awhile defendant opened the door slightly, peeked out, and said, "I'm changing. I'll leave right now." When he eventually moved back from the door, Lo pushed it open. Lo thought defendant looked sweaty, but he appeared to be unusually calm. Surveillance video of this exchange was shown to the jury.

Using a flashlight Lo and Velasco saw Kassandra on the floor, wrapped in a blanket. Her eyes were wide open, and blood was everywhere. Velasco's sledgehammer and power saw were

nearby. Confused, Velasco called for Sarabia to turn on the light. They then clearly saw Kassandra on the floor. Lo ran from the garage into the house and called 911. As she was leaving the garage, she heard Velasco ask what had happened, and defendant reply, "I don't know" and, "Don't worry. I'll take care of this." Garcia thought he heard defendant say something to the effect that he would clean it up, and to help him get her up. Defendant then ran back and forth from the garage and repeatedly said, "Tell her not to call" and, "I'll take care of it." Then defendant asked for the keys to the van, which Velasco refused.

When defendant came out of the garage, Garcia noticed that his feet were bare and wet. Defendant asked Garcia for keys to one of the cars he kept there, which Garcia refused. Defendant then ran away. Surveillance video showed defendant running away a few minutes before 1:00 a.m.

John Mora, who lived around the corner from Lo and Velasco, had known defendant for more than 10 years. At about 1:00 a.m., Mora opened his front door in response to defendant's pounding. Mora told him to leave, concerned that he would disturb Mora's family. At first, defendant grabbed Mora's car key, but gave it up when Mora threatened to harm defendant. He then asked for a ride, and Mora agreed. Before he got out of the car, defendant told Mora that he had "fucked up" and said, "You'll find out later."

Kassandra's body was found wrapped in a blanket, with head exposed, back down on two rugs. Tools were spread out in the garage, including a power saw with blood on the blade and a 16-inch-long sledgehammer near Kassandra's feet. The power saw was unplugged. Blood, hair and brain matter appeared on

the metal head of the hammer. There was blood on the floor, a mirror, and two desks in front of the mirror. The bathroom shower was wet.

Deputy medical examiner Kevin Young testified that during the autopsy of Kassandra's body he observed large gaping lacerations with skull fractures on the left side of her head and at the base of her skull. There were smaller lacerations at the back of her head and on her right eyebrow, as well as an abrasion on her cheek. The larger impact fractured the skull into many pieces, and although the pieces could have caused the smaller lacerations, Dr. Young thought it was more likely that they were separate impacts, as the lacerations were located on either side of the head. In his opinion it was most likely that two blows were delivered to Kassandra's head. The larger blow which caused the severe fracture also shredded and pulverized the left side of the brain. The head injuries were consistent with force used by a blunt weapon such as a hammer. He found no wounds on Kassandra's hands.

Dr. Young also found severe trauma to Kassandra's neck to the point of near decapitation. Her spine, spinal cord, trachea, the right and left carotid arteries, and the right jugular vein were severed. The injury was consistent with her neck having been cut by an electric saw with about an inch and a half of usable blade past the guard. As it was a clean cut, the saw must have been activated. Dr. Young did not think it possible to saw through the spine manually by pushing and pulling a small blade across the neck.

Dr. Young concluded that the cause of death was multiple head and neck trauma with near complete decapitation. He was

unable to form an opinion as to whether the head trauma preceded the neck trauma.

Defense evidence

Defendant testified that he met and began dating Kassandra in June 2014, and sometime after that they lived together. Unbeknownst to Lo, for a few months they lived in a car parked in Velasco's backyard. Defendant described his relationship with Kassandra as very loving.

Defendant admitted having been convicted of the following felonies: in 2006, of robbery, in 2012, of commercial burglary, and in 2015, of car theft. In 2009, defendant was convicted of possession of methamphetamine, as well as misdemeanor battery on a spouse or cohabitant. Defendant began using marijuana at the age of 13 and methamphetamine at the age of 14. He was addicted to methamphetamine, marijuana, and alcohol and used them daily. As time went on he used more and was never able to quit. He had experience with withdrawal, but not by choice. He described feeling good when high, which erased his problems and took away his pain. Defendant reduced his use only when he was incarcerated. By November 20, he was using two grams of methamphetamine per day to get high. When he was not working, he stole to get money to pay for his drugs.

Defendant used methamphetamine daily during the four days preceding November 20. On November 16, 17 and 18, he used methamphetamine and alcohol all day, including the two days he worked moving furniture for Lo and Velasco's moving company.

On November 19, defendant used both methamphetamine and PCP in the afternoon. He and Kassandra both used drugs while they were visiting with a friend. They spent that night at

the Sydney Drive garage. Defendant denied having slept that night, and claimed to have seen Sarabia leave for work. The next morning at about 6:00 or 7:00 a.m., defendant drank a capful of liquid "ecstasy," given to him by Smith. He had never used it before, and did not know what it was.

About a week before he killed Kassandra, defendant heard a rumor that she might be "sleeping around." His father told him that he had seen her getting out of a car with two men while wearing skimpy clothes. When defendant questioned her about it, she denied it. Defendant admitted during the days leading up to November 20, he spoke to Kassandra with words such as, "Get the fuck out of here," and "stop being stupid," but could not remember the exact words. On November 20, defendant again asked Kassandra if she was being unfaithful to him. Kassandra again denied it, and they argued and she cried. Defendant testified that his last use of methamphetamine was about 7:00 p.m., and the argument began between 7:00 and 8:00 p.m. Three hours had elapsed between the time he had taken the drug and his arrival at the Sydney Drive duplex. Defendant claimed that he had not slept in five or six days. He was tired, frustrated, and was experiencing the unusual feeling that he knew other people's next move before it was made. He thought the ecstasy had caused a different kind of high.

Defendant could not remember going in and out of the garage as shown in the surveillance video. Defendant remembered that when he arrived, Sarabia and Smith were in the garage and he asked them for a pipe to smoke methamphetamine. He remembered that Garcia told him and Kassandra to leave, and that he did not leave because he wanted to get high and was looking for a pipe. Defendant and Kassandra

continued their argument after Smith and Sarabia went to their room and closed the door. Defendant kept pressing Kassandra for the "truth," saying, "Stop fucking with me. Just tell me." Kassandra continued with denials, and defendant kept pressing. Feeling frustrated, tired, burnt out, he finally said, "Just tell me the truth and, you know, we'll work . . . something out, we'll work it out." Kassandra then admitted she had been sleeping around for money to get high, but would not say with whom. Defendant testified that he felt hurt, sad, angry, betrayed and confused so he then sniffed all his remaining methamphetamine. He had leaned his head back, when Kassandra approached him. He thought she was going to slap him, so he put his left hand in front of his head, and then he felt a hard impact on the side of his head. He did not see what she used to hit him. He was not knocked out, but developed a bump. He then saw the sledgehammer on the floor, became enraged, so he grabbed the hammer and swung it at Kassandra. Defendant was unable to say whether the hammer in evidence was the same hammer he used.

On cross-examination, defendant testified that Kassandra was about five feet away when he saw her hand coming toward him as though she was going to slap him. He did not see anything in her hand and could not tell whether her hand was open when he saw her swinging it. He also remembered that whatever she had hit him with hit his leg and then the chair before hitting the floor. Defendant explained that he grabbed it from the floor, while overwhelmed by feelings of rage, intense emotions, and confusion.

Defendant said he was not thinking about anything when he picked up the hammer and swung it at Kassandra. He could

not remember how many times he swung the hammer, whether he chased Kassandra, whether he made contact, tapped her with it, or swung hard, or whether she fell to the ground. Nor could he remember picking up the saw, turning it on, applying it to Kassandra's neck, or seeing the blanket. Defendant did not remember locking the door to the garage, refusing to admit Lo, washing himself in the shower, or trying to take the keys from Mora. He did not remember changing his clothes or shoes, and claimed that when he left for Mexico the next day he was wearing the same clothes he wore when he attacked Kassandra.

The first thing defendant remembered after swinging the hammer was seeing the lights of Velasco's van. When he saw the lights, he "snapped out of" his "trance" or rage and then saw Kassandra lying on the floor. Since it was dark, he could not see what was wrong with her. He did not recall seeing Kassandra wrapped in a blanket though he knew something was wrong with her. He did not check her and could not remember why he did not.

Defendant did not remember speaking with Velasco or Lo, or their attempts to get into the garage. Defendant remembered nothing from the time he saw the van lights until he was in Mora's car. He then knew that something had gone horribly wrong, but he did not know what. Defendant explained that he ran because he was scared and paranoid. He did not discover what had happened until the next day when he asked his friend Larry to do a Google search, and then he could not believe it.

Defendant did not seek medical attention for his head, and did not try to contact the police. Larry gave him money and a ride to Tijuana, where defendant bought a ticket to Nayarit. There he contacted his uncle, spent the night at his

grandmother's ranch, and then his uncle took him to a rehabilitation facility where he stayed for two weeks. Although defendant knew the police were looking for him, he did not notify them while there. Mexican authorities found him at the facility and he was returned to Los Angeles.

Psychiatrist William Wirshing testified as an expert on the effects of methamphetamine use. Dr. Wirshing testified that about 60 percent of his recovery center patients have comorbid methamphetamine use, addiction, or dependence. He added that acute and chronic methamphetamine use causes chemical changes in the brain that can alter cognitive ability, resulting in significant changes in perception, attention, focus, memory, and judgment. Chronic use is associated with serious neurodegenerative conditions including Parkinson's disease and early dementia. Chronic use decreases the functioning of the prefrontal cortex, which is responsible for impulse control and regulation, rage control, focus, and working memory. Users experience feelings of pleasure and joy but over time, addicts develop a tolerance and need escalating dosages in order to get the same feelings. With chronic use, methamphetamine can cause hallucinations, which are usually visual, but can be followed by tactile sensations and auditory hallucinations. Methamphetamine use interferes with sleep and promotes an acute wakeful state. As a consequence of sleep deprivation over several days, the user starts to hallucinate, experience dreams while awake, and become delirious, going in and out of attention. A substantial impairment of cognition or development of psychosis takes from five to ten years of chronic use. A chronic methamphetamine user would have demonstrably impaired memory compared to nonusers, and the user would not remember

all the days he had ingested the drug. However, memory would not be severely impaired. A person who exhibits extreme impairment due to methamphetamine use would have issues with impulse control and judgment, and it is conceivable that in an extreme case his actions would not have a rational order to it. Feeling able to predict what is about to happen is a psychotic experience that can occur with methamphetamine use. The drug disrupts memory storage, and the user becomes confused about what happened first.

Dr. Wirshing explained that PCP, or phencyclidine, is also addictive. It acts as a disassociative and esthetic agent. It disassociates the user from his physical and emotional experience, separates the user from emotional distress and the physical experience, creating what seems like disembodied cognition. It can have an hallucinogenic effect, even at doses lower than that which causes disassociation.

MDMA, or methylenedioxymethamphetamine,[2] he explained, causes a disproportionate stimulation of serotonin and releases oxytocin, the hormone involved in maternal bonding. It causes the user to feel close to people and removes natural barriers to social discourse.

There are various tests to determine brain damage from chronic methamphetamine use, such as a functional MRI to look at such things as blood flow and oxygen uptake, a PET scan which can detect tiny strokes that occur from the increased blood pressure associated with methamphetamine use. Dr. Wirshing evaluated defendant in October 2017 for up to two hours, but did not record the interview or keep his notes. Prior to the interview,

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[2] MDMA is also known as ecstasy. (See http://unabridged.merriam-webster.com/unabridged/mdma.)

he reviewed preliminary hearing testimony and a doctor's report, but he was not aware of any physical tests or brain scans done on defendant.

In response to a hypothetical question of a person who was chronically addicted to methamphetamine, had been sleep deprived for five or six nights, had taken an unknown quantity of PCP at least once, and "potentially" had liquid MDMA, Dr. Wirshing opined that such a person would predictably have grossly impaired executive decision-making. He explained that sleep deprivation targets the entire brain.

Dr. Wirshing agreed with the prosecutor that goal-directed behavior could be one way to assess the extent of impairment. He acknowledged that grabbing a hammer, hitting a person on the head with it, sawing her neck, wrapping the body in a blanket, and then fleeing all sounded like goal-directed behaviors.

In response to court questioning, Dr. Wirshing testified that it was uncommon to take PCP, ecstasy, and methamphetamine at the same time. Although it was uncommon, he had come across the combination before. He testified that the most common drug taken with methamphetamine was marijuana.

Rebuttal

Mora testified on rebuttal that in conversations with defendant approximately four days or up to a week before the murder, defendant told him something to the effect that Kassandra had "fucked up" and had been "sleeping around." Defendant indicated that he knew it was true by telling Mora specifics about those who Kassandra had been with. Sometime

after that conversation, defendant came to Mora's house looking for Kassandra.

Mora testified that when defendant came to the house on November 21 to ask for a ride, he did not appear to have any injuries, and he did not complain that his head hurt.

DISCUSSION

I. Malice instructions

Defendant contends that the trial court incorrectly instructed the jury that malice is not an element of voluntary manslaughter. Defendant's examples include portions of instructions such as the following: CALJIC No. 8.11, defining express malice (the intent to unlawfully kill a human being) and implied malice (doing an act known to be dangerous to human life with a conscious disregard for human life); CALJIC No. 8.37 ("The crime of manslaughter is the unlawful killing of a human being without malice aforethought"); No. 8.40 ("There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury"); No. 8.50 ("The distinction between murder and manslaughter is that murder requires malice while manslaughter does not").

"'[T]he correctness of jury instructions is to be determined from the entire charge of the court . . . .' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it . . . . [Citations.]" (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.) "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales*

(2011) 51 Cal.4th 894, 940.) "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." (*Boyde v. California* (1990) 494 U.S. 370, 380-381.)

"'Murder is the unlawful killing of a human being . . . with malice aforethought.' (§ 187, subd. (a).) 'Manslaughter is the unlawful killing of a human being *without malice*.' [Citation.] Manslaughter is a lesser included offense of murder, and a defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. Heat of passion is one of the mental states that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter. [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 538, citing § 192, subd. (a); *People v. Breverman* (1998) 19 Cal.4th 142, 154.) The instructions given here amply explained these concepts.[3]

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[3] The trial court gave the jury instructions, including CALJIC Nos. 5.17 (imperfect self-defense), 8.10 (murder defined), 8.11 (malice aforethought defined), 8.20 (deliberate and premeditated murder), 8.30 (unpremeditated second degree murder), 8.31 (second degree murder by unlawful act dangerous to life), 8.37 (manslaughter defined), 8.40 (voluntary manslaughter defined), 8.42 (sudden quarrel or heat of passion, provocation explained), 8.50 (distinction between murder and manslaughter), 8.55 (cause of death defined in murder and in manslaughter cases), 8.70 (the two degrees of murder), 8.71 (reasonable doubt as to degree), and 8.75 (partial verdict in

Defendant argues that the instructions erroneously suggested that no killing with malice could be manslaughter and that all killings with malice must be murder. Defendant cites no authority suggesting that CALJIC pattern instructions regarding murder and manslaughter or their explanations of malice are incorrect. Rather, defendant bases his argument on his reading of *People v. Bryant* (2013) 56 Cal.4th 959 (*Bryant*), which he construes as holding that malice is an element of voluntary manslaughter. With careful paraphrasing and partial quotes, defendant contends that *Bryant* held at page 969 that "circumstances may cause malice to be 'negated,' or disregarded but it still must be 'actually present.'" The California Supreme Court did not make such a statement. Without defendant's manipulation, the court's statement on that page made clear that the court did not depart from what it called "[t]he thrust of [its] reasoning" in prior opinions, where it had explained that "the offense constituted voluntary manslaughter instead of murder because a key element of malice aforethought was *lacking*, *not* because malice aforethought was actually present but was 'negated' or 'disregarded' due to some other consideration as in [such] cases . . . ." (*Id.* at p. 969, italics added.)

Defendant apparently construes *Bryant* as holding that malice is simply a synonym for intent to kill. However, it is "the intent to *unlawfully* kill [which generally] constitutes malice. [Citations.]" (*People v. Rios* (2000) 23 Cal.4th 450, 460, italics added.) The *Bryant* court was addressing a felony-murder issue

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homicide cases). The defendant did not object to any of these instructions.

unrelated to defendant's contentions here,[4] and explained that "the offenses that constitute voluntary manslaughter -- a killing upon a sudden quarrel or heat of passion (§ 192, subd. (a)), a killing in unreasonable self-defense [citation] . . . are united by the principle that when a defendant acts with an intent to kill or a conscious disregard for life (i.e., the mental state ordinarily sufficient to constitute malice aforethought), other circumstances relating to the defendant's mental state *may preclude the jury from finding that the defendant acted with malice aforethought*. But in all of these circumstances, a defendant convicted of voluntary manslaughter has acted either with an intent to kill or with conscious disregard for life." (*Bryant*, *supra*, 56 Cal.4th at pp. 969-970, italics added.)

Although defendant uses the term "incorrect" and "incorrectly" throughout his argument to describe the instructions, or the giving of the instructions, he acknowledges that the instructions correctly conveyed to the jury that even if it found that defendant acted with express or implied malice, such malice could be negated, disregarded, or excused by adequate provocation or imperfect self-defense. Defendant explains that his contention is that the instructions were incorrect *as applied to this case*, because when read together, they were confusing, ambiguous, and incomprehensible. Defendant suggests that confusion would have been avoided if the instructions had explained that "the law uses 'malice' in two different ways: as a

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[4] The *Bryant* court held: "Because a killing without malice in the commission of an inherently dangerous assaultive felony is not voluntary manslaughter, the trial court could not have erred in failing to instruct the jury that it was." (*Bryant*, 56 Cal.4th at p. 970.)

matter of fact and a matter of law," or if the trial court had instructed regarding voluntary manslaughter only with CALCRIM Nos. 570 and 571, regarding heat of passion and imperfect self-defense, without mentioning malice.

Defendant does not claim that he requested CALCRIM instructions, that he objected to the CALJIC instructions, or that he pointed out any supposed flaws in the CALJIC instructions. "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

Regardless, defendant's contentions are without merit. When instructions are claimed to be confusing, conflicting, or ambiguous, the reviewing court must determine "whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. [Citations.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4.) To demonstrate the jurors' confusion and prejudice, defendant argues that there was significant evidence that he acted under the influence of a sudden quarrel, heat of passion, or imperfect self-defense. He points to his testimony that Kassandra ultimately admitted her infidelity, which caused him to feel hurt, angry, sad, confused and betrayed. He also points to Kassandra's reaction to his refusal to share his methamphetamine, when she said, "I hate you, I hate you," and then hit him on the head with the hammer. Without further explanation defendant also claims that the jury's request for read back of Dr. Young's testimony showed that the case was close.

With regard to imperfect self-defense, the jury was instructed: "A person who kills another person in the *actual* but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully but does not harbor malice aforethought and is not guilty of murder." (Italics added.) "[I]n a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant's* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.]" (*People v. Rios*, *supra*, 23 Cal.4th at pp. 461-462.) Defendant failed to do so.

Defendant testified that after he refused to share his drugs, Kassandra said, "I hate you. I hate you." She then approached him and he felt a hard impact on his head, felt something touch his leg, looked down, and saw the hammer on the floor. He became enraged and picked up the hammer and swung it at her. Defendant did not know if Kassandra had used the hammer, did not remember hitting her or any of his actions with the power saw. Defendant did not testify that he believed he had to attack Kassandra in order to defend himself, or that he believed that his life was in imminent peril. Indeed no other evidence suggested that he *actually* harbored such a belief. The only evidence he presented on the question was that he did not think, but instead acted on his rage. Defendant has thus failed to demonstrate any likelihood that the jury misunderstood or misapplied its instructions with regard to imperfect self-defense.

With regard to sudden quarrel or heat of passion, the trial court thoroughly instructed the jury that the passion must have resulted from provocation by the decedent or was reasonably believed by the defendant to have been engaged in by the

decedent, and that the provocation must have been of the "character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion."

First, there was no evidence of a *sudden* quarrel here, as defendant admitted that the quarrel had started before 8:00 p.m. that evening and continued with defendant pressing Kassandra to confess her infidelity by cursing at her until she finally confessed. From his room in the garage, Sarabia heard them arguing around 11:00 p.m., heard defendant say, "If you want to fuck with me," and heard Kassandra reply "No, no, no," in a tone of voice indicating denial, that something was not true, while she was crying. Both Garcia's observations and the surveillance cameras confirm that Kassandra was alive about 30 minutes before Lo and Velasco returned home from the bowling alley about 12:40 a.m.

Second, there is no other evidence suggesting jury confusion or misunderstanding regarding sudden quarrel or heat of passion. The trial court instructed with CALJIC Nos. 8.42 and 8.43 regarding legally sufficient provocation to cause defendant to act in the heat of passion or due to a sudden quarrel, and defendant acknowledges that these instructions were a correct statement of the law. The instruction thus correctly informed the jury that the actual provocation must have been such to cause an "ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from passion rather than from judgment." (See *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.)

Generally more than a single incident of infidelity is required to establish legally sufficient provocation. (See, e.g.,

People v. Berry (1976) 18 Cal.3d 509, 514-516; *People v. Borchers* (1958) 50 Cal.2d 321, 328-329; *People v. Le* (2007) 158 Cal.App.4th 516, 528-529.) Defendant had known about Kassandra's infidelity for days up to a week before the killing. Moreover, defendant did not testify that Kassandra's confession enraged him, but that rather he felt hurt, sad, angry, betrayed, and confused. These feelings prompted him only to take a dose of methamphetamine and let it drip down his throat while defiantly refusing Kassandra's pleas for some of the drug. Defendant testified that it was after he saw Kassandra's hand near his head, felt a blow to his head, felt something on his leg he *assumed* was caused by the sledgehammer because he saw the hammer on the floor, that he *then* exploded in intense rage.

"The test of adequate provocation is an objective one . . . . The provocation must be such that an average, *sober* person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 60, italics added.) The trial court read CALJIC Nos. 4.21, 4.22, 4.71, instructing the jury that although voluntary intoxication *may be considered* in determining whether defendant harbored an intent to kill, it would not negate implied malice. The instructions were correct, "[b]ecause the test of sufficient provocation is an objective one based on a reasonable person standard, the fact the defendant is intoxicated or suffers from a mental abnormality or has particular susceptibilities to events is irrelevant in determining whether the claimed provocation was sufficient. [Citation.]" (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83, citing *People v. Steele*, *supra*, 27 Cal.4th at p. 1253.) Defendant had used methamphetamine, marijuana, and alcohol

during the days leading up to the killing. A day earlier he used methamphetamine and PCP, and on the day of the killing he used methamphetamine and "ecstasy." Also, defendant used methamphetamine immediately before he became enraged that Kassandra had hit him with something he assumed was a hammer. Defense expert, Dr. Wirshing testified that chronic use of methamphetamine can lead to hallucinations, impulse control and psychotic thoughts of knowing what is about to happen. In sum, the evidence presented and the instructions regarding actual passion and legally sufficient provocation gave the jury clear guidance to determine whether defendant acted with malice or whether circumstances precluded a finding of malice. The jury had before it ample evidence and adequate instructions to conclude that an average, sober person would not lose reason and judgment under the circumstances faced by defendant. We conclude that there is no reasonable probability that the jury was confused by the manslaughter, murder, and malice instructions.

II. Causation and premeditation

Defendant contends that the jury instructions did not adequately inform the jury that to convict him of first degree murder, it must find that defendant's premeditation and deliberation preceded the specific act that actually caused death. He argues that the instructions given allowed the jury to base a conviction of first degree murder on premeditation and deliberation of the lethal sawing of Kassandra's neck, even if she was already dead at the time due to the hammer blows, and even if it determined that the fatal hammer blows were not premeditated. Defendant cites no authority in support of this contention.

Deputy Medical Examiner Young, testified that each of Kassandra's two head injuries was consistent with a hammer blow on each side of the head, one larger and fatal, and that her neck injuries were consistent with use of a power saw. Dr. Young could not say whether the fatal blow to the head would have immediately caused death, but he said that it would have been rapid. He determined that the cause of Kassandra's death was "multiple head and neck trauma with near complete decapitation." He testified that he was unable to determine the time or the order of each of the injuries inflicted.

In addition to instructions on first degree murder and second degree murder, the jury was instructed with regard to premeditation and deliberation with CALJIC No. 8.20, as follows:

> "All murder which is perpetrated by any kind of willful, deliberate, and premeditated killing with express malice aforethought is murder of the first degree."
>
> "The word 'willful,' as used in this instruction, means intentional."
>
> "The word 'deliberate,' which relates to how a person thinks, means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."
>
> "The word 'premeditated' relates to when a person thinks and means considered beforehand. One premeditates by deliberating before taking action."
>
> "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was as a result of

> deliberation and premeditation so that it must have been formed on pre-existing reflection and not under a certain heat of passion or other condition, precluding the idea of deliberation, it is murder of the first degree. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances."
>
> "The true test is not in the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time. But a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree."
>
> "To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing, and the reasons for and against such a choice, and having in mind the consequences, he decides to and does kill."

Soon after deliberations began the jury sent out a note with the following question: "If the initial act is not determined to be premeditated, and the second act is determined premeditated, can both acts be viewed as a whole?" The jurors were brought into court and were asked to clarify what was meant by the "initial act" and "the second act." After further consideration the jury sent back the following note: "The jury considers the first act to involve the hammer and the second act involves the saw."

The trial court expressed its intention to read an instruction on causation, have the jury review all murder instructions beginning with CALJIC No. 8.10, and to allow further argument by counsel if the jurors wanted further argument. The jurors wanted not only additional argument, but also a readback of the medical examiner's testimony.

Following read back of Dr. Young's testimony, the trial court read CALCRIM No. 240 as follows:

> "An act causes death if the death is the direct, natural, and probable consequence of the act, and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A 'substantial' factor is more than a trivial or remote factor; however, it does not have to be the only factor that causes the death."

Counsel was then allowed further argument. Defendant's trial counsel argued that circumstantial evidence showed that Kassandra died from the hammer blows before the saw was used. Among other evidence he pointed out that Sarabia heard no screams, and Dr. Young testified that death from the hammer blows would have been rapid. Defense counsel referred the jury to its instruction regarding circumstantial evidence, and argued that confronted with two opposing reasonable inferences drawn from circumstantial evidence, it must choose the inference raising a reasonable doubt, and thus must choose in this case the inference that Kassandra was dead before the saw was used.

The prosecutor argued that the evidence did not show the hammer blows to have been inflicted in a heat of passion, that the evidence of all defendant's conduct before and after the hammer blows, including getting the saw and using it, was evidence of his premeditation and deliberation before picking up the hammer.

The jury had sufficient information to reject a finding of premeditation and deliberation if it inferred that the hammer blows were not premeditated and that the hammer killed Kassandra before the saw was used. CALJIC No. 8.20 instructed the jury that "premeditated" meant thinking and considered beforehand, before taking action, and that for first degree murder, it must find that the premeditation and deliberation preceded and accompanied *the killing*.

The evidence, argument and instructions could also allow the jury to reasonably infer that both deadly acts were substantial factors in bringing about Kassandra's death. Dr. Young testified that such injuries would be rapidly fatal, but not necessarily immediately so. Defendant claimed not to remember getting or using the saw, so it is unknown when he plugged it in, how long it took him to pick it up, and how soon after the hammer blows he started cutting with it.

The instructions, evidence and argument could also allow the jury a third option. In determining premeditation and deliberation, the jury could properly have considered evidence of planning, a preexisting motive, the manner of killing, and any other circumstantial evidence from which premeditation and deliberation may reasonably be inferred. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) The jury was not limited to considering only defendant's conduct prior to the actual killing, but could properly

consider all of defendant's conduct, before, during, and after the killing. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1129 (*Perez*).) Thus, where, as in this case, the evidence does not establish that defendant knew whether the victim was dead after a first attack, the circumstances surrounding a second attack may be probative of the defendant's state of mind prior to or during the initial attack. (*Id*. at pp. 1127-1128.)

We agree with respondent that the trial court met its obligation to instruct the jury on "general principles of law" (*People v. Flannel* (1979) 25 Cal.3d 668, 672), and that if defendant wished to have the court instruct in different or particular words, he was required to request a pinpoint instruction. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1117.)

III. Response to the jury's question

Under a different heading, defendant again takes issue with the trial court's response to the jury's questions, in particular the response to the question, "If the initial act is not determined to be premeditated, and the second act is determined premeditated, *can both acts be viewed as a whole*?" (Italics added.) Defendant contends: "Even if the instructions were sufficient, the trial court failed to correctly answer this jury's question and eliminate this jury's confusion." He argues that the trial court should have responded to the jury's note with something to the effect of the following:

> "No. If you find that the use of the hammer was not premeditated and deliberated but the use of the saw was, you may not view those two acts as one whole. If you find that only the use of the saw was premeditated and deliberated, then you must determine if the use of the saw was a cause of death. If you conclude that only the use of the saw was premeditated and deliberated and have a reasonable

> doubt about whether the use of the saw was a cause of death, then you must find the defendant not guilty of first degree murder."

We observe that if defendant wished to have the court instruct in different or particular words, he was required to request a pinpoint instruction in the trial court. (See *People v. Saille*, *supra*, 54 Cal.3d at p. 1117.)

We have already determined that the trial court adequately answered the jury's questions. We found that CALJIC No. 8.20 sufficiently instructed the jury that "premeditated" meant thinking and considered beforehand, before taking action, and that for first degree murder, it must find that the premeditation and deliberation preceded and accompanied the killing. We note that without death, there is no killing. As defense counsel was permitted to argue this point to the jury, we do not agree that any further instruction was required. We pointed out that the jury was permitted to consider all the circumstances of both deadly attacks in determining defendant's state of mind when he killed Kassandra. (See *Perez*, *supra*, 2 Cal.4th at pp. 1127-1129.)

Defendant contends that counsel rendered ineffective assistance by not requesting a pinpoint instruction. To prevail on this claim, defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.)

Defendant has failed to demonstrate counsel error. Defendant's proposed response to the jury's note would most surely have been rejected, as it would have caused more, not less confusion, to categorically tell the jury that it could not consider both acts as a whole. The jury was permitted to consider all of defendant's conduct, before, during, and after the killing to determine whether the defendant committed premeditated murder. (See *Perez, supra*, 2 Cal.4th at pp. 1127-1128.) Thus, the jury was permitted to consider the circumstances of both acts as a whole. As respondent observes, trial counsel is not obligated to interpose meritless objections. (*People v. Farnam* (2002) 28 Cal.4th 107, 186, fn. 36.) Nor does counsel perform deficiently for failing to make meritless requests. (*People v. Ochoa* (1998) 19 Cal.4th 353, 432, 463.)

Defendant has also failed to demonstrate prejudice. He reasons that "it was highly likely the jury would do what the prosecutor urged it to do -- consider the acts as one whole and focus on the planning and thought that apparently were required to operate the saw." As we discussed above, the response defendant proposes here would have been confusing and properly rejected. As we have determined that the jury was entitled to consider all of the circumstances as a whole in order to infer defendant's state of mind when he performed the fatal act, the prosecutor's argument was not erroneous, and defendant has failed to demonstrate that he was prejudiced by proper argument.

IV. Court questions

Defendant contends that the trial court improperly engaged Dr. Wirshing in the following colloquy:

> "The Court: I have one question. How common is it for someone, within a 24-hour period, to take PCP, ecstasy, and methamphetamine at the same time?

Especially if they, for example, haven't, apparently, used PCP and ecstasy in the past.

"[The Witness]: Yeah, the combination is a little unusual.

"The Court: It is, isn't it?

"[The Witness]: As I say, PCP is so different in terms of its effect, it's unusual to -- not unusual to -- it's unusual to combine them. If you look at our urine positives, the most common one to be co-occurring with PCP is actually marijuana.

"The Court: That's not what I asked. I guess I asked is it something you come across?

"[The Witness]: Oh, certainly. Oh, certainly.

"The Court: The three in a 24-hour period?

"[The Witness]: Oh, I thought you asked is it common. But have I seen that. Oh, definitely.

"The Court: Those three drugs together?

"[The Witness]: Yes. Mm-hmm. You see that on occasion. It's just not a common thing for a person to indulge in. But I've seen urines for all three."

Defendant contends that the court's questions implied a belief that defendant did not tell the truth about his drug use, and that the court effectively allied itself with the prosecution.

Defendant's trial counsel did not object to any of the court's questions. The failure to object forfeits a claim of judicial

misconduct unless defendant demonstrates that an objection would be futile or that a timely admonition would not have cured any potential prejudice. (*People v. Houston* (2012) 54 Cal.4th 1186, 1220.) Defendant contends on appeal that no admonition would have avoided prejudice because judges have great influence with juries. Defendant's own reasoning is self-negating. If judges have great influence with juries, then the jury was likely influenced by the court's later reading of CALJIC No. 17.30 to the jury, as follows:

> "I have not intended by anything I have said or done, or by any questions I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion."

We presume that the jurors understood and followed the trial court's instruction and note that defendant has pointed to no evidence that they did otherwise. (*People v. Gonzales, supra*, 51 Cal.4th at p. 940.)

Defendant also contends that any objection would have been futile, because (in defendant's opinion) no judge would be likely to consider his own question and comments improper. We agree that an objection may have been futile, but not due to judicial egotism, but rather because such an objection would have been without merit. "Evidence Code section 775 ""confers upon the trial judge the power, discretion and affirmative duty . . . [to] participate in the examination of witnesses whenever he believes that he may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his right of explanation, and in

eliciting facts material to a just determination of the cause.'" [Citations.] [¶] The constraints on the trial judge's questioning of witnesses in the presence of a jury are akin to the limitations on the court's role as commentator. The trial judge's interrogation "must be . . . temperate, nonargumentative, and scrupulously fair. The trial court may not . . . withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." [Citation.]' [Citation.]" (*People v. Harris* (2005) 37 Cal.4th 310, 350.)

We agree with respondent that the trial court's questioning was proper under such guidelines. Contrary to defendant's characterization of the questions, the court did not express any view regarding defendant's credibility. Indeed, the court brought out testimony that, if anything, served to corroborate defendant's claim that he had ingested not only methamphetamine that day, and not only PCP, but also liquid ecstasy. The jury could easily have found such testimony difficult to believe and falsely made solely to bolster defendant's claim of having been in a kind of trance. But in response to the court's questions, Dr. Wirshing testified that although the drug combination was uncommon, he had previously encountered it.

We also agree with respondent that there is no reasonable likelihood that the court's questions caused defendant any prejudice. Defendant argues that his drug use was the core of the defense, and as we have observed, the court's questions brought out testimony that might have lent credibility to what the jury might otherwise have rejected as an exaggerated or false claim. As we have also noted, the court read CALJIC No. 17.30 to the jury, and we presume that the jury followed it.

Finally, compelling evidence supported a finding of premeditation and deliberation. "'Premeditation and deliberation can occur in a brief interval. "The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, our Supreme Court suggested three categories of evidence, planning activity, preexisting motive, and manner of killing, from which premeditation and deliberation may be inferred. (See also *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) There is no requirement that all three factors be established or that any factor must be shown by direct evidence. (*Perez*, *supra*, 2 Cal.4th at pp. 1124-1125.) The defendant's conduct before, during, and after the killing may provide circumstantial evidence of premeditation. (*Id.* at p. 1129.)

Evidence of motive came from defendant's anger and mistreatment of Kassandra prior to the murder. Defendant had a history of speaking rudely to Kassandra, as he had been previously heard by others cursing at her and ordering her about. Evidence showed that his anger with Kassandra for her infidelity had been building the week before the murder. In addition, defendant admitted calling Kassandra stupid and cursing at her, and then telling her, "You know why. You know what you did." Defendant's behavior on the day and evening of the murder strongly suggested that defendant had become even more angry due to Kassandra's denials and her refusals to comply with his demands for a confession. Before going to the Sydney Drive garage, he pressured her, argued with her, made her cry, and finally left, telling her not to come with him. He pushed her

away when she tried to hug him. Once in the garage, he continued his pressure, cursed at her and again made her cry.

Defendant's actions during and after the killing, as well as the manner of killing, strongly support the conclusion that defendant premeditated Kassandra's killing. The evidence showed that sometime between midnight and 12:40 a.m., defendant killed Kassandra by striking her twice in the head with a sledgehammer and nearly decapitating her with an electric saw. He then locked the door to the garage, wrapped Kassandra's body in a blanket, placed her on a rug, took a shower, changed his clothes, and turned out the lights in the garage. This evidence, combined with the evidence of defendant's motive, strongly supports an inference that defendant harbored a premeditated intent to kill Kassandra.

There was also overwhelming evidence that defendant was conscious of his guilt and aware of his actions. The order that defendant wrapped the body, took a shower, changed clothes, locked the door, and turned out the light is also unknown. However, whatever the order, such actions, along with his delay in unlocking the door and his refusal to open it, his asking Velasco to stop Lo from calling the police, his flight from the scene, and his flight to Mexico, provided compelling evidence that they were carried out consciously and methodically, effectively discrediting the suggestion that he was so intoxicated or so brain damaged, that he took all these actions without thinking or remembering them.

In addition, as respondent points out, defendant's claim that the drugs he ingested impaired his consciousness, lacked credibility given defendant's clear memory of what drugs he took, the days on which he took them, and the times that he took them

prior to the murder. It was the opinion of defendant's own expert that a chronic methamphetamine user would "absolutely not" remember "all the days" that he used methamphetamine. Furthermore, Dr. Wirshing acknowledged that grabbing a hammer, hitting a person on the head with it, sawing her neck, wrapping the body in a blanket, and then fleeing all sounded like goal-directed behaviors.

We conclude that as overwhelming evidence supported a finding of premeditation and deliberation, there is no reasonable probability that the verdict would have been different without the trial court's questioning of Dr. Wirshing.

V. Victim's methamphetamine use

Defendant contends that the trial court abused its discretion and violated defendant's constitutional rights to due process and to present a defense by excluding evidence that methamphetamine had been found in Kassandra's blood.

The trial court excluded the evidence as irrelevant and on the basis of Evidence Code section 352. "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) """"The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence."" [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 444 (*Thornton*).)

Evidence Code section 352 provides that the trial "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing

the issues, or of misleading the jury." (See also *People v. Valdez* (2012) 55 Cal.4th 82, 138.) The trial court enjoys broad discretion in making its assessment, and its discretion will not be disturbed unless defendant demonstrates that it was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest a miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; Evid. Code, §§ 352, 354; Cal. Const., art. VI, § 13.)

As our Supreme Court has said multiple times, the trial court has broad discretion in excluding evidence of the victim's drug use or intoxication. (*People v. Loker* (2008) 44 Cal.4th 691, 735-736.) The court is not required to admit evidence of the victim's drug use that merely makes her look bad. (*Id.* at p. 736, citing *People v. Kelly* (1992) 1 Cal.4th 495, 523; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.)

While the exclusion of relevant evidence vital to the defense will implicate the defendant's constitutional rights, "'a defendant has [no] constitutional right to present all relevant evidence in his favor, no matter how limited in probative value such evidence will be so as to preclude the trial court from using Evidence Code section 352.' [Citations.]" (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) When relevant evidence has been excluded under such ordinary rules of evidence, defendant bears a heavy burden to demonstrate a violation of his right to due process under the Constitution. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 42-43.) As defendant did not raise constitutional issues below, he must first meet his burden to establish state law error. (*Thornton, supra*, 41 Cal.4th at pp. 443-444.)

In the trial court, the issue was raised by the prosecutor, just after the defense rested. She explained that she had told

defense counsel that she would stipulate that methamphetamine had been found in Kassandra's heart blood during the autopsy, if the court found it to be relevant. The trial court found that the evidence was not relevant, and that under Evidence Code section 352, the court found that it would only serve to make the victim look bad, that there had already been testimony that she used drugs, and that there was no reason to admit toxicology or other evidence regarding the amount she used. Defense counsel agreed that the *amount* of methamphetamine in Kassandra's blood was not relevant, but argued that the fact of its presence lent credibility to defendant's testimony. He argued that it would provide "corroborating evidence that they were actually indeed doing drugs together." Defense counsel explained that "[t]he only relevance . . . is that what [defendant] testified to is not just something he conjured up. There is some fact there."

Defendant sought to use the evidence to bolster his general credibility in the trial court. On appeal, defendant contends that the proffered evidence would have corroborated his testimony and enhanced his credibility because it would have shown that Kassandra had ingested methamphetamine at some point *shortly before her death*. There was no such offer of proof below. The prosecutor merely said that the autopsy showed the presence of methamphetamine in Kassandra's heart blood. There was no mention of evidence concerning the amount ingested or how long before her death it was ingested.

Citing Evidence Code section 210, defendant further contends that evidence confirming that Kassandra had ingested methamphetamine shortly before her death "was relevant because it had a 'tendency in reason to prove,' as [defendant] claimed, that Kassandra had used methamphetamine on the

evening she died, and (albeit less directly) suggested that when [defendant] said he and Kassandra routinely used methamphetamine together, that testimony was also true." We have found no such testimony. Defendant refers to page 1229 of the reporter's transcript, and claims that he "testified specifically that they had used drugs together the day before the killing and the night of the killing." Defendant exaggerates his testimony. On the cited page, defendant testified merely that on the evening of November 19, 2015, he and Kassandra were at a friend's house and that Kassandra was using drugs with him. Defendant did not specify the drug she used. Defendant also cites page 1238, where the only mention of drugs was defendant's testimony that he "wanted to get high [and] was looking for a pipe." Defendant does not refer to any page in the reporter's transcript where he testified that Kassandra had used methamphetamine on the evening she died or that they routinely used methamphetamine together.

Defendant also contends that "in conjunction with Dr. Wirshing's testimony about how methamphetamine makes people act, the blood result made far more plausible [defendant's] claims about Kassandra's behavior. If Kassandra was under the influence of methamphetamine, it made far more sense that, in response to [defendant's] refusal to share methamphetamine, she became enraged, impulsively picked up a hammer, and, having less control over her emotions, resorted to violence by hitting him in the head." Defendant overstates Dr. Wirshing's testimony. Dr. Wirshing did not testify as to the significance of an unknown amount of methamphetamine in the heart blood, how long methamphetamine remains in the blood, or how long the effects of an unknown amount of methamphetamine might last. He

testified that "acute" use causes chemical changes in the brain that "can" result in significant changes in perception, attention, focus, memory, and judgment. However, it is *chronic* use which is responsible for impulse and rage control. Just as there was no offer to prove how much methamphetamine Kassandra ingested or when or how long before her death it was ingested, there was no offer to prove that she was a chronic user.

In essence, defendant argues that his general credibility and Kassandra's use of a hammer would be bolstered with evidence that Kassandra took methamphetamine in an unknown quantity, at an unknown time, but with no evidence that she was a chronic methamphetamine user or had ever used it more than once. Defendant argues this would corroborate defendant's testimony that Kassandra used a drug, the name and quantity of which he did not reveal, on November 19, 2015. Defendant's arguments, based upon mischaracterizations of the evidence provide no basis to find that the trial court's exercise of discretion was arbitrary, capricious or patently absurd.

Moreover, under Evidence Code section 352, defendant must demonstrate not only that the ruling was erroneous, but also that the error resulted in a miscarriage of justice. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124; Evid. Code, §§ 352, 354; Cal. Const., art. VI, § 13.) He must meet his burden under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), by showing a reasonable probability of a different result absent the alleged error. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.) For the same reasons that defendant failed to provide a basis for this court to find that the trial court's exercise of discretion was arbitrary, capricious or patently absurd, he has failed to demonstrate a reasonable

probability of a different result if the jury had been told that the autopsy showed methamphetamine in Kassandra's heart blood.

Defendant argues that the exclusion of the evidence was prejudicial because it "was the only evidence that tended to corroborate [defendant's] claim that Kassandra was using methamphetamine the night she was killed, and was highly probative of a factual question critical to all defense theories: did Kassandra hit [defendant] with a hammer?" The evidence did not tend to corroborate defendant's testimony that Kassandra was using methamphetamine the night she was killed, because there was no such evidence to corroborate.

Nor was the blood evidence probative of defendant's claim that Kassandra hit him with a hammer. Defendant testified that he did not see what was in her hand, if anything, because it was dark. Defendant then gave contradictory explanations that after he felt an impact on his head, he felt whatever she used hit his leg and then the floor. He looked down, and all he saw was the hammer. The court asked: "So you're saying she hit you with a hammer?' Defendant replied, "Yes." When the prosecutor showed him the hammer in evidence, he said he believed that it was the same hammer that was in evidence. However, earlier in his testimony, he was shown the hammer in evidence and did not know whether that was the hammer. In addition, he initially testified that he was not thinking anything when he picked up the hammer. There was no evidence that Kassandra was a chronic user, and it is not reasonably probable that merely knowing that Kassandra had an unknown quantity of methamphetamine in her heart blood would have made the jury find defendant's contradictory testimony any more believable.

We conclude that as defendant has failed to show error or a miscarriage of justice under the *Watson* standard, his constitutional claim fails as well. (See *Thornton*, *supra*, 41 Cal.4th at pp. 443-444.) Regardless, we would conclude beyond a reasonable doubt that under all the circumstances we have discussed above, any constitutional error would have been harmless.

VI. Admissions to prior conviction allegations

Defendant contends that his sentence must be reversed because his admissions to prior conviction allegations were not made knowingly and voluntarily, because the trial court failed to advise him of the specific penal consequences of his admissions.

When a criminal defendant admits a prior conviction allegation that subjects him to increased punishment, the trial court is required to ensure that the plea is knowing and voluntary. (*People v. Cross* (2015) 61 Cal.4th 164, 170.) The court must "inform the defendant of three constitutional rights -- the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers -- and solicit a personal waiver of each [*Boykin-Tahl* waivers]. [Citations.]" (*Ibid.*, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244, and *In re Tahl* (1969) 1 Cal.3d 122, 130-133.) In addition, under a judicially declared rule of criminal procedure (see *In re Yurko* (1974) 10 Cal.3d 857, 863-864), the trial court must advise the defendant "of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal. [Citation.]" (*People v. Cross*, *supra*, at pp. 170-171.) "The failure to properly advise a defendant of his or her trial rights is not reversible 'if the record affirmatively shows that [the admission] is voluntary and

intelligent under the totality of the circumstances.' [Citation.]" (*Id*. at p. 179, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

On March 22, 2018, prior to the verdicts, defendant waived his right to a jury trial on his prior convictions and agreed to a bench trial. The court told him that he had "an absolute right to have . . . this identical jury . . . determine whether or not you have some prior convictions." The court asked defendant, "Have you talked to your lawyer about your rights in this regard?" And defendant replied, "Yes, I have." Defendant was convicted the next day, and the court scheduled the bench trial on the prior convictions and a sentencing hearing. It was not until two weeks after filing his sentencing memorandum and one week after the prosecution filed its sentencing memorandum, that defendant admitted the prior convictions.

At the time of trial on the prior convictions, after advising defendant of his constitutional trial rights and other matters, the following colloquy ensued:

> "The Court: Did you discuss your constitutional rights, the admissions of these priors and any other questions you may have with your attorney?"
>
> "The defendant: Yes.
>
> "The Court: And do you understand that by admitting these priors it is going to permit the court to give you additional time on this case?
>
> "The defendant: Yes.
>
> "The Court: Is there anything else I have neglected to ask him?"

The prosecutor replied that she did not think so, and there was no reply by defense counsel. The court then took defendant's admissions. The court accepted the admissions and found the defendant understood the consequences of his admissions, that he had knowingly, freely, and voluntarily given up his constitutional rights, that there was a factual basis for the admissions based on documents reviewed by the court, showing that defendant had in fact suffered the prior convictions.

Defendant does not claim that the trial court failed to advise him of his three constitutional trial rights or take personal waivers, but he contends that *nothing in the record* establishes that defendant was aware of the precise penal consequences of his admissions.

We agree with respondent that defendant has failed to preserve this issue for appeal. "Unlike the admonition of constitutional rights, however, advisement as to the consequences of a plea is not constitutionally mandated. Rather, the rule compelling such advisement is 'a judicially declared rule of criminal procedure.' [Citation.]" (*People v. Walker* (1991) 54 Cal.3d 1013, 1022 (*Walker*), overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) For this reason, "the error is waived absent a timely objection." (*Walker*, at p. 1023.) In *Walker*, the trial court neglected to inform the defendant that a restitution fine would be imposed when he pled guilty. As the defendant was represented by counsel and the record reflected that defense counsel was familiar with the probation report in which the fine was recommended, the California Supreme Court held that if the recommendation had "'come as a genuine surprise, it would have been a simple matter to bring the issue to the attention of the trial court.' [Citation.]" (*Ibid.*)

Here too, defense counsel was familiar with the penal consequences of admitting the prior convictions. The bench trial on the prior convictions and sentencing hearing were scheduled for May 16, 2018. Two weeks earlier, defense counsel submitted a motion to dismiss defendant's strike conviction pursuant to *People v. Superior Court (Romero)* 13 Cal.4th 497, to be heard on the date of sentencing. Included with the motion was a sentencing memorandum. The sentencing memorandum noted the maximum possible sentence and its component parts at page 4, as follows:

"**B. <u>Sentencing Recommendation</u>**.

"**<u>Defendant's Maximum Exposure:</u>**

"Count 1: Penal Code section 187(a)(1) {25 years to life}

"Enhancements:

"PC 667 (a)(1): 5 years

"PC 12022 (b)(1): 1 year

"PC 667.5(b): 1 year x 3

"PC 1170.12 (c)(1): 'strike' x 2 multiplier

"Total maximum penalty: 9 years plus 50 years to life."

The sentencing memorandum set forth defendant's objection to the use of the prior robbery conviction as a strike prior in addition to it being used to impose a five-year recidivist enhancement and a one-year prison prior enhancement. Defendant also objected to the use of his prior methamphetamine conviction as a one-year prison prior enhancement. The memorandum concluded with a request that the prior strike conviction be stricken, and that the trial court impose a term of 25 years to life plus one year. One week after defendant's

sentencing memorandum was filed, the prosecution filed its sentencing memorandum, setting forth factors in aggravation and asking the court to impose a prison term of 60 years to life.

Thus, defense counsel was well aware that defendant faced 25 years to life in prison, doubled to 50 years to life in prison, plus nine years if he admitted his prior convictions. Moreover, at the outset of the scheduled bench trial, the trial court stated: "My understanding is that the defendant is going to admit the priors. The further understanding is -- and this was already part of my sentencing -- that we're not going to impose anything for the 11377. And I also indicated I'm not going to impose anything for the one-year prior relating to the robbery." Defense counsel stated, "Correct." We infer from these statements that there was an off-the-record discussion among counsel and the court prior to the hearing regarding the admissions, including the assertion in defendant's sentencing memorandum that the court should not impose both a prison prior and a recidivist enhancement based upon the same robbery conviction alleged as a strike.

Defendant has both failed to preserve the issue for review and to demonstrate prejudice. "'Unlike an uninformed waiver of the specified constitutional rights which renders a plea or admission involuntary and requires that it be set aside, an uninformed waiver based on the failure of the court to advise an accused of the consequences of an admission constitutes error which requires that the admission be set aside only if the error is prejudicial to the accused.' [Citation.] 'A showing of prejudice requires the appellant to demonstrate that it is reasonably probable he would not have entered his plea if he had been told about the [consequence].' [Citations.]" (*Walker, supra*, 54 Cal.3d at pp. 1022-1023.)

Defendant contends that the *Walker* forfeiture and prejudice rules have no application here because the failure to advise of penal consequences in that case involved a restitution fine, not an additional 33 years in prison, as in this case. He acknowledges, however, that the advisement requirements are the same whether the court is taking a guilty plea or an admission to prior convictions. (See *People v. Howard, supra*, 1 Cal.4th at pp. 1132, 1175.) The distinction *Walker* made was between advisement of constitutional rights and judicially declared rights, not the severity of the penal consequences. (*Walker, supra*, 54 Cal.3d at p. 1023.) Defendant cites no authority holding otherwise.

Defendant makes no effort to demonstrate that he would not have admitted the prior convictions if he had known the precise penal consequences of his admissions. Nor does he point to the record where it shows he was ignorant of the penal consequences. Defendant simply claims that nothing in the record establishes that he was aware of the them, and thus reversal is required. Not only do we disagree but observe that our review of the record affirmatively shows that defendant's admissions were voluntary and intelligent under the totality of the circumstances, and are thus not reversible. (*People v. Cross, supra*, 61 Cal.4th at p.179, quoting *People v. Howard, supra*, 1 Cal.4th at p. 1175.)

VII. Cumulative error

Defendant contends that the cumulative effect of all the claimed errors was to deny him a fair trial. Because "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject

defendant's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

VIII. Recidivist enhancement

The trial court applied one five-year recidivist enhancement under section 667, subdivision (a)(1), due to defendant's prior serious felony conviction of robbery. Defendant requests that we remand the matter in light of Senate Bill No. 1393 (Stats. 2018, ch. 1013), which amended Penal Code sections 667 and 1385, effective January 1, 2019, to give trial courts discretion whether to strike recidivist enhancements for prior serious felony convictions imposed under section 667, subdivision (a).

Respondent agrees that remand is appropriate, as do we. The statute applies to defendant under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Remand is required in cases such as this where the sentencing record does not indicate that the trial court "would not, in any event, have exercised its discretion to strike the [sentence enhancement]. [Citation.]" (*People v. Superior Court (Romero), supra*, 13 Cal.4th at p. 530, fn. 13 (amended Three Strikes law); see also *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080-1081 [amended firearm enhancement statute].) As the court made no comment which clearly indicates that it would not have exercised its discretion to strike the recidivist enhancement, the matter should be remanded for the limited purpose of allowing the trial court to consider whether or not to do so. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the trial court to exercise its discretion whether or not to strike the enhancement imposed under section 667, subdivision (a)(1). If the court elects to exercise this discretion, the defendant shall be resentenced and an amended abstract of judgment prepared and forwarded to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT